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Nonconsensual Surgery: The Unkindest Cut of All

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NOTES

NONCONSENSUAL SURGERY: THE UNKINDEST CUT OF ALL

I. Introduction

Nonconsensual surgery is a term used to describe a state-ordered operation to obtain evidence from within an individual's body. This type of surgery presents serious constitutional questions.[1] Nonconsensual surgery may violate the fourth amendment's proscription of unreasonable searches[2] as well as the fourteenth amendment's guarantee of due process.[3]

Although the Supreme Court had not ruled directly on the issue of nonconsensual surgery, the cases of *Rochin v. California*,[4] *Breithaupt v. Abram*,[5] and *Schmerber v. California*[6] are helpful in an analysis of this problem. In *Schmerber*, the Supreme Court held that a nonconsensual blood test performed in a hospital environment did not constitute an unreasonable search. *Breithaupt* teaches that this nonconsensual blood test does not deprive the suspect of his right of due process. *Rochin*, on the other hand, held that the circumstances surrounding a state-ordered stomach pumping violated the suspect's right of due process.

Of course, the bodily intrusions that *Rochin*, *Schmerber*, and *Breithaupt* discuss are fundamentally different from the surgical incision involved in nonconsensual surgery. Surgery is an intrusion of greater magnitude, and involves considerably more pain and risk of complications. Nevertheless, the eight American courts[7] that have faced the vexing problem of nonconsensual surgery have

1 The fifth amendment provides that a person shall not be compelled in any criminal case to be a witness against himself. U. S. CONST. amend. V. Since nonconsensual surgery frequently yields evidence which is used against the suspect at trial, the argument has been made that the suspect is forced to be a witness against himself in violation of the fifth amendment.

Although this contention is initially appealing, the Supreme Court's ruling in Schmerber v. California, 384 U.S. 757 (1966), has settled this issue. In *Schmerber*, the petitioner contended that a nonconsensual blood test forced him to be a witness against himself in violation of the fifth amendment. The Supreme Court rejected this contention and held that the privilege against self-incrimination extends only to communicative and testimonial evidence. 384 U.S. at 761. A blood sample, the Court said, like fingerprints and voice prints, is mere physical evidence which is not protected by the fifth amendment. *Id.*

The effect of the *Schmerber* holding on the nonconsensual surgery area is obvious. Evidence surgically removed from a suspect and used against him at trial is like a blood sample: i.e., mere physical evidence. Therefore, as in *Schmerber*, nonconsensual surgery involves no fifth amendment violation since the suspect is not compelled to be a witness against himself in any constitutionally proscribed manner.

2 "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. CONST. amend. IV. The fourth amendment is applicable to the states through the fourteenth amendment. *See* note 3 *infra*.

3 "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV.

4 342 U.S. 165 (1952).

5 352 U.S. 432 (1957).

6 384 U.S. 757 (1966).

7 United States v. Crowder, 543 F.2d 312 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); State v. Overstreet, 551 S.W.2d 621 (Mo. 1977); Bowden v. State, 256 Ark. 820, 510 S.W.2d 879 (1974); People v. Smith, 80 Misc.2d 210, 362 N.Y.S.2d 909 (1974); Adams v. State, 260 Ind. 663, 299 N.E.2d 834 (1973), *cert. denied*, 415 U.S. 935 (1974); Allison v. State, 129 Ga. App. 364, 199 S.E.2d 587 (1973), *cert. denied*, 414 U.S. 1145 (1974); Creamer v. State, 229 Ga. 511, 192 S.E.2d 350 (1972), *cert. denied*, 410 U.S. 975 (1973); State v. Burnett, No. 72-2023 (Cir. Ct. for Crim. Causes, St. Louis, Mo., Dec. 1, 1972).

relied on these Supreme Court cases. Four of these courts[8] have held the surgery in question to be constitutionally permissible, and four courts[9] have held that the proposed surgery violates the fourth or fourteenth amendments. This lack of consistency is partly the result of differing interpretations of the Supreme Court cases and demonstrates the need for a uniform standard in the nonconsensual surgery area.

Although nonconsensual surgery raises serious constitutional questions, it is the thesis of this note that nonconsensual surgery does not inevitably violate an individual's rights. An individual's constitutional right to remain free from surgical intrusions is not absolute; it must be balanced against the competing interests of the state in securing this evidence.

An analysis of the seven reported[10] nonconsensual surgery cases will show that the central controversy in this area involves the standard to be used in evaluating the conflicting interests of the state and the individual. Accordingly, this note will present a uniform standard which should be used when a state is faced with the problem of nonconsensual surgery. The use of this standard will allow a state to compel an individual to submit to surgery without abridging his right to be free from unreasonable searches under the fourth amendment, and to due process under the fourteenth amendment.

II. The Supreme Court Bodily Intrusion Cases

A. *The Fourth Amendment and Nonconsensual Surgery*

No constitutional right is more fundamental than the fourth amendment's restriction against unreasonable searches and seizures.[11] The fourth amendment protects a person's dignity and privacy against unwarranted intrusions by the state by constraining all searches which are unreasonable under the circumstances.[12] The courts protect this right of freedom from unreasonable searches by excluding evidence obtained in contravention of the fourth amendment.[13]

Nonconsensual surgery involves a "search" since an individual's justifiable expectation of privacy is violated by such an operation.[14] The central question

8 The *Crowder, Allison, Creamer,* and *Burnett* courts held that, under the circumstances, nonconsensual surgery did not violate the suspect's rights. *See* note 7 *supra.*

9 The *Overstreet* and *Adams* courts each held that the nonconsensual surgery performed on the suspect violated his rights. The courts in *Bowden* and *Smith* refused to permit major nonconsensual surgery because it would violate the suspect's rights. *See* note 7 *supra.*

10 State v. Burnett, No. 72-2023 (Cir. Ct. for Crim. Causes, Dec. 1, 1972), is an unreported St. Louis, Missouri trial court decision.

11 Union Pac. R. Co. v. Botsford, 141 U.S. 250 (1891).

12 Elkins v. United States, 364 U.S. 206 (1960).

13 The purpose of the rule excluding evidence seized in violation of the fourth amendment is to discourage lawless police conduct. Weeks v. United States, 232 U.S. 383, 391-93 (1914). The Supreme Court has further noted that without the exclusionary rule the constitutional guarantee against unreasonable searches and seizures would be a "mere form of words." Mapp v. Ohio, 367 U.S. 643, 655 (1961). *Mapp* held that the federal exclusionary rule, adopted for federal prosecutions in *Weeks,* must be applied in criminal prosecutions in state courts.

14 Katz v. United States, 389 U.S. 347 (1967). In this case, Katz was convicted of transmitting wagering information by telephone in violation of federal statute. At his trial, the government introduced evidence which they obtained by placing an electronic listening and recording device on the outside of a public telephone booth Katz had used. On appeal, Katz alleged that this electronic eavesdropping constituted an illegal search and seizure. The

is whether this surgical search is reasonable and therefore permissible under the fourth amendment. In addressing this problem, the nonconsensual surgery cases have relied on the landmark case of *Schmerber v. California*.[15]

In *Schmerber*, the petitioner was involved in a car accident and hospitalized. While in the hospital, a police officer noticed the smell of liquor on Schmerber's breath and asked him to take a blood test.[16] On advice of counsel, Schmerber refused. Nevertheless, the officer directed a physician to take a blood sample. Based on the results of this nonconsensual blood test, Schmerber was convicted of driving while intoxicated.[17]

Schmerber contended that the results of the blood test should have been excluded as the product of an illegal search and seizure.[18] The Supreme Court noted that the blood test was given in a hospital environment under strict medical safeguards,[19] and that the state has a great interest in deterring drunk drivers. The majority concluded that, since blood tests are commonplace and generally involve no risk, trauma, or pain, Schmerber's blood test was reasonable and not violative of the fourth amendment.[20] The holding in *Schmerber*, however, was carefully limited:

> It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.[21]

Schmerber thus stands solely for the proposition that a nonconsensual blood test performed under strict medical safeguards is a minor intrusion which does not violate the fourth amendment.

Caution must be used in applying the *Schmerber* holding to the nonconsensual surgery area. Although both blood tests and nonconsensual surgery involve bodily intrusions, there is a fundamental difference between the pinprick in *Schmerber* and the intrusion of a surgeon's scalpel. Moreover, the reasons the Court advanced to authorize blood tests in *Schmerber* do not apply to nonconsensual surgery. *Schmerber* allowed the blood test because it was commonplace

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Supreme Court reversed his conviction and held that the government's activities constituted an illegal search since they had unreasonably violated Katz's justifiable expectation of privacy. *Id.* at 353.

15 384 U.S. 757 (1966).

16 *Id.*

17 *Id.* at 758.

18 *See* note 13 *supra.*

19 Finally the record shows that the test was performed in a reasonable manner. Petitioner's blood was taken by a physician in a hospital environment according to accepted medical practices. We are thus not presented with the serious questions which would arise if a search involving use of medical technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medical environment—for example, if it were administered by police in the privacy of the stationhouse. To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain.

384 U.S. at 771, 772.

20 384 U.S. at 772.

21 *Id.*

and routine.[22] By contrast, surgery is not common and involves physical and mental discomfort. Unlike a blood test, surgery involves anesthesia, post-operative painkillers, stitches and scars. In addition, surgery involves a significantly higher risk of infection, post-surgery complications, as well as an immensely greater personal intrusion. Further, blood tests were allowed by the *Schmerber* Court because of their possible deterrent effect on drunk drivers.[23] The threat of surgery to retrieve evidence, however, would not similarly deter criminals.

These basic differences indicate that although *Schmerber* does not explicitly forbid nonconsensual surgery, it cannot be read to authorize all surgical intrusions into an individual's body. As discussed earlier, *Schmerber* is instructive because it deals with a constitutionally permissible intrusion into an individual's body. *Schmerber* indicates that a nonconsensual intrusion will be considered reasonable under the fourth amendment only when the state's interest in collecting this imbedded evidence is carefully weighed against the nature and extent of the intrusion and the individual's interest in preserving the sanctity of his body.[24]

B. *Due Process and Nonconsensual Surgery*

The fourteenth amendment states that no person shall be deprived of life, liberty, or property without due process of law.[25] Past Supreme Court decisions demonstrate that due process is a flexible concept;[26] its contours are necessarily vague and indefinite.[27] In the criminal context, the Court safeguards the constitutional guarantee of due process by scrutinizing the entire course of proceedings to determine whether convictions have been obtained by methods that offend a sense of justice.[28]

The Supreme Court has recognized that forcible state intrusions into an individual's body raise due process questions. In *Rochin v. California,*[29] for example, deputy sheriffs forced their way into Rochin's bedroom after receiving information that Rochin was selling narcotics. While in Rochin's bedroom, the sheriffs spotted two capsules, which Rochin quickly swallowed.[30] The sheriffs grabbed Rochin and unsuccessfully tried to force the capsules from his mouth. Rochin was then taken to a hospital where an emetic solution was forced into his stomach. The two recovered capsules contained narcotics, and Rochin was convicted of possession of morphine.[31]

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22 *Id.*

23 "[E]xtraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol." *Id.* at 771.

24 In other words, the questions we must decide in this case are whether the police were justified in requiring petitioner to submit to the blood test, and whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness.

Id. at 768.

25 U.S. CONST. amend. XIV.

26 *See, e.g.,* Malinski v. New York, 324 U.S. 401 (1945); Jackman v. Rosenbaum Co., 260 U.S. 22 (1922).

27 *See, e.g.,* F. Pollock, *The History of the Law of Nature,* ESSAYS IN THE LAW 31-79 (1922).

28 Malinski v. New York, 324 U.S. 401 (1945).

29 342 U.S. 165 (1952).

30 *Id.* at 166.

31 *Id.*

On appeal, the Supreme Court reversed Rochin's conviction because the capsules were obtained by methods that violated the due process clause of the fourteenth amendment. The *Rochin* Court said:

> [R]egard for the requirements of the due process clause inescapably imposes upon this Court an exercise of judgement upon the whole course of proceedings in order to ascertain whether they offend these canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.[32]

The Court held that due process had been violated because the techniques used to wrest the capsules from Rochin were "too close to the rack and screw to permit of constitutional differentiation."[33]

The Supreme Court did not hold nonconsensual stomach pumping to be a *per se* violation of the fourteenth amendment.[34] Rather, *Rochin* held that due process is violated when the totality of circumstances shows that evidence is gathered in a manner which "shocks the conscience."[35]

Another Supreme Court case involving a due process challenge to a nonconsensual bodily intrusion is *Breithaupt v. Abram*.[36] After being knocked unconscious in a serious automobile accident, Breithaupt was taken to the emergency room of a nearby hospital. A policeman noticed the smell of liquor on Breithaupt's breath and directed a physician to take a blood sample. Analysis showed that Breithaupt's blood contained .17% alcohol. Based upon this unauthorized blood test, Breithaupt was convicted of involuntary manslaughter.[37]

Breithaupt challenged his conviction by relying on *Rochin* and alleging that his right to due process was violated by this nonconsensual blood test. The Supreme Court, however, affirmed Breithaupt's conviction and held that a nonconsensual blood test administered in a hospital environment does not violate due process.[38] The Court distinguished this case from *Rochin* by noting that there was nothing brutal or offensive in the taking of a blood sample under the supervision of a physician.[39] The holding was also based on the fact that blood tests are so common. As the Court stated:

> The blood test procedure has become routine in our everyday life. It is a ritual for those going into the military service as well as those applying for marriage licenses. Many colleges require such tests before permitting entrance and literally millions of us have voluntarily gone through the same, though a longer routine, in becoming blood donors.[40]

32 342 U.S. at 169 (quoting Malinski v. New York, 324 U.S. 401, 416-17 (1945)).
33 342 U.S. at 172.
34 *Id.*
35 *Id.*
36 352 U.S. 432 (1957).
37 *Id.*
38 *Id.* at 435.
39 We set aside the conviction [Rochin's] because such conduct "shocked the conscience" and was so "brutal" and "offensive" that it did not comport with traditional ideas of fair play and decency. We therefore found that the conduct was offensive to due process. But we see nothing comparable here to the facts in *Rochin*.
Basically the distinction rests on the fact that there is nothing "brutal" or "offensive" in the taking of a sample of blood when done, as in this case, under the protective eye of a physician.
Id.
40 *Id.* at 436.

The Court noted that a blood test is a scientifically accurate measurement of alcohol in the blood. Moreover, the *Breithaupt* Court reasoned that allowing this test could have a deterrent effect on other intoxicated drivers on the highway.[41] The Court concluded that these considerations far outweighed an individual's interest in immunity from bodily intrusions.[42]

Rochin and *Breithaupt* are instructive since they discuss nonconsensual bodily intrusions in the context of due process. *Schmerber* and *Breithaupt* show that a state's interest in keeping its citizens safe and in apprehending criminals can outweigh a suspect's interest in keeping his body free from intrusions. *Rochin* indicates that the method of the bodily intrusion must be carefully scrutinized to ensure adherence to due process.

These Supreme Court bodily intrusion cases are relevant to the nonconsensual surgery area because they show that a court should apply a balancing test to assess the validity of bodily intrusions ordered by the state. Of course, these cases are not dispositive of the nonconsensual surgery issue since a surgical incision is considerably more intrusive than the needle prick in *Breithaupt* and *Schmerber,* or the stomach pumping in *Rochin.*

III. The Nonconsensual Surgery Cases

Six of the American nonconsensual surgery cases have involved minor surgery. In these cases, the evidence could be removed from the suspect in a brief operation using only a local anesthetic.[43] Generally, these operations pose little risk to the suspect's life. Two of the nonconsensual surgery cases, however, have involved major surgery. In major surgery, a general anesthetic[44] is required and the operation poses a substantial threat to the suspect's life.

A. *Minor Surgery*

The first American case allowing nonconsensual surgery to retrieve evidence from a suspect's body was *Creamer v. State.*[45] After Creamer was implicated in a double murder, the police noticed that he had a bullet entry wound, but no exit wound. Police-ordered x-rays showed a piece of steel superficially lodged in Creamer's chest. Upon application for a search warrant to authorize surgery

41 The test upheld here is not attacked on the ground of any basic deficiency or of injudicious application, but admittedly is a scientifically accurate method of detecting alcoholic content in the blood, thus furnishing an exact measure upon which to base a decision as to intoxication. Modern community living requires scientific methods of crime detection lest the public go unprotected. The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield.

Id. at 439.

42 *Id.*

43 A local anesthetic is used to render a selected part of the body insensitive to pain. The drug is topically applied and the patient does not lose consciousness. Local anesthetic achieves its effect by blocking the conduction of nerve impulses to and from a well-defined area. *See* J. WILSON & J. MCDONALD, HANDBOOK OF SURGERY (1960).

44 A general anesthetic is introduced into the bloodstream and transported to the central nervous system. A general anesthetic can cause analgesia, amnesia, unconsciousness, and loss of reflexes and muscle tone. *See* J. WILSON & J. MCDONALD, *supra* note 43.

45 229 Ga. 511, 192 S.E.2d 350 (1972), *cert. denied,* 410 U.S. 975 (1973).

to retrieve the bullet, the Georgia trial court ordered Creamer transported to a local hospital for surgery. Creamer appealed the order on the ground that the proposed surgery violated his right to be free from unreasonable searches.[46] This contention was dismissed by the Georgia Supreme Court, which interpreted *Schmerber* as allowing all minor intrusions into a person's body. Since Creamer's proposed surgery was minor, the court held that this operation constituted a minor intrusion which did not violate Creamer's fourth amendment rights.[47]

The Georgia Supreme Court made two fundamental errors in applying the *Schmerber* criteria to the nonconsensual surgery area. First, *Schmerber* did not authorize all minor intrusions into the body.[48] *Schmerber* was limited to the authorization of the minor intrusion of a blood test in a hospital environment. The *Schmerber* Court specifically stated that it reached "this judgement only on the facts of the present record"[49] and that its holding did not automatically permit intrusions under other conditions.[50]

Secondly, the *Creamer* court erroneously equated minor surgery with the minor intrusion of the blood test performed on Schmerber.[51] The court failed to realize that even surgery which is medically determined to be minor involves an incision more intrusive than the needle prick necessary for a blood test.[52]

Although the *Creamer* court was incorrect in assuming that *Schmerber* would permit all minor surgery, it is the focus of this note that some minor surgery is constitutionally permissible. The most analytical case in this area, *United States v. Crowder*,[53] shows that the state can compel an individual to submit to minor surgery without violating his rights. The *Crowder* case is particularly important because it was decided by the United States Court of Appeals for the District of Columbia Circuit. Since the other nonconsensual surgery cases were decided by state courts, this is the most influential court yet to rule on the issue of nonconsensual surgery. When nonconsensual surgery cases arise

46 *Id.* at 514, 192 S.E.2d at 352.
47 *Id.* at 515, 192 S.E.2d at 353.
48 *See* text accompanying note 19 *supra.*
49 384 U.S. at 772.
50 *Id.*
51 229 Ga. at 515, 192 S.E.2d at 353.
52 Another Georgia nonconsensual surgery case decided shortly after *Creamer,* was Allison v. State, 129 Ga. App. 364, 199 S.E.2d 587 (1973). Allison was convicted of robbery by force after an incriminating bullet was surgically removed from his right side. On appeal, the Georgia Court of Appeals reluctantly affirmed the introduction of the bullet into evidence.

Allison is chiefly noteworthy because the majority realized the errors the *Creamer* court made in applying the *Schmerber* criteria to the nonconsensual surgery area. The *Allison* court stated:

> The writer [Judge Evans of the Court of Appeals of Georgia] also believes that the Georgia Supreme Court misinterpreted Schmerber v. California, 384 U.S. 757 (1966), in the Creamer opinion wherein the extraction of a minute quantity of a person's blood was considered a minor intrusion into an individual's body. From reading Justice Brennan's opinion in Schmerber it is very doubtful that the Supreme Court would extend that case further, for a surgical knife is considerable [sic] more intrusion into the human body than a mere needle inserted for blood testing . . . . this writer, I repeat, if free to do so, would reverse. But, I am bound by Creamer, and the denial of the motion to suppress the bullet removed from the defendant's body through surgery was not error.

129 Ga. App. at 365, 199 S.E.2d at 589.
53 543 F.2d 312 (D.C. Cir. 1976), *cert. denied,* 429 U.S. 1062 (1977).

in the future, it is likely that the analysis and procedures outlined in *Crowder* will be used as a model.[54]

Crowder was implicated in the murder of a dentist. After Crowder's arrest, the police noticed that his wrist and knee were bandaged. An x-ray examination revealed that bullets, which appeared to be of the same caliber that killed the dentist, were lodged in Crowder's wrist and knee.[55] The State's Attorney applied to the district court for an order authorizing surgical removal of the bullet superficially lodged in Crowder's right wrist. The Senior Medical Officer of the District of Columbia jail presented an affidavit which stated that the bullet could be removed from Crowder's right wrist with little risk to him.[56] The physician stated that in his medical opinion the operation to remove the bullet from Crowder's wrist would constitute minor surgery.[57]

The district court found probable cause to believe that Crowder had committed the murder and that evidence of the crime was located in Crowder's wrist. The court authorized the surgery to remove the bullet from Crowder's wrist on the ground that the contemplated operation was a permissible intrusion under *Schmerber*.[58]

Before the operation was performed, however, Crowder was given a chance to apply for appellate review of the order. The United States Court of Appeals for the District of Columbia Circuit denied a writ of prohibition against execution of the order. Consequently, the operation to remove the bullet was successfully carried out under stringent medical conditions. Based upon this extracted evidence, Crowder was convicted of second-degree murder, robbery, and carrying a dangerous weapon.[59]

This case again came before the United States Court of Appeals on an appeal from the denial of the motion to suppress the evidence removed from Crowder's wrist. The court concluded that the bullet had been properly admitted, and affirmed the conviction.[60]

In doing so, the *Crowder* court discussed a number of significant factors. The court noted that Crowder had been afforded counsel at an adversary hearing before a neutral and detached magistrate. The magistrate had found probable cause to believe both that Crowder had committed the crime and that evidence of that crime was imbedded in his wrist.[61] The state had also proven that the evidence was vital to its case and could be obtained in no other way.

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54 Indeed, the most recent nonconsensual surgery case, State v. Overstreet, 551 S.W.2d 621 (Mo. 1977), held that nonconsensual surgery violated a suspect's rights unless the careful procedures in *Crowder* were followed. *Id.* at 627-28. *See* discussion in text *supra,* at IIIa.

55 543 F.2d at 313.

56 The Medical Officer stated that it would be medically inadvisable to remove the bullet from Crowder's knee. *Id.*

57 It is therefore my medical opinion, based upon reasonable medical certainty, that the surgical removal of the slug would not involve any harm or risk of injury to Mr. Crowder's arm or hand or the use thereof. The surgical removal of the slug would be considered as minor surgery.

Id.

58 *Id.* at 314.

59 *Id.* at 313.

60 *Id.* at 318.

61 *Id.* at 316.

Finally, the magistrate allowed appellate review of the order before the operation.

The *Crowder* court then reviewed the operation itself and the circumstances in which it was performed. Medical testimony established that this was a minor operation: it was performed in ten minutes, with the aid of a local anesthetic. The court also noted the adherence to maximum medical precautions.[62] Although this same operation was normally performed on an outpatient basis, Crowder remained in the hospital for observation for four days after the operation.[63] Moreover, the court emphasized that unlike the situation in *Rochin,* no force was used on Crowder. The court of appeals thus held that this operation did not violate Crowder's right to due process or his right to be free from unreasonable searches.[64]

In a strong dissent, Judge Robinson contended that the nonconsensual surgery performed on Crowder was an unreasonable search violative of the fourth amendment.[65] Judge Robinson pointed out that the *Schmerber* holding could not be extended to nonconsensual surgery because the reasons for allowing blood tests do not apply to surgery. The *Schmerber* court allowed the blood test because it was commonplace and had a deterrent effect on drunk drivers. Surgery, on the other hand, is an extraordinary procedure which would have no deterrent effect on prospective criminals.[66]

The dissent also predicted that courts in the future may mistakenly rely on *Crowder* as permitting all minor surgical intrusions without due regard for the careful procedures followed by the *Crowder* court. Judge Robinson felt that since future nonconsensual surgery cases might involve circumstances totally different from those in *Crowder,* courts would have difficulty determining exactly which combination of factors satisfies the broadly worded constitutional standards.[67]

The most recent nonconsensual surgery case, *State v. Overstreet,*[68] also involved minor surgery. In *Overstreet,* the defendant was convicted of first-degree murder and first-degree robbery after an incriminating bullet was surgically removed from his buttocks. The Missouri Supreme Court reversed Overstreet's conviction because the state had not adhered to the careful procedures followed

62 The surgeon who operated on Crowder said that "because the bullet was removed by court order, without the consent of Crowder we bent over backwards to make sure from the surgical point of view that he had every protection." *Id.* at 315.

63 *Id.*

64 In any event, we are not here called upon to give general approval of surgical operations in search of evidence. We are concerned only with the procedures followed in this case. We think those procedures were reasonable and justified in the circumstances.

Id. at 316.

65 *Id.*

66 *Id.* at 321.

67 I am unable to view calmly this court's action in sanctioning new and far greater bodily exploration than the ubiquitous needle-insertion permitted in *Schmerber.* By extending that decision to all instances of so-called "minor surgery," the court paves the way for judicial approval of any evidentiary expedition which on its own facts might seem to fall within that ill-defined limit. There are, I believe, grave dangers inseparably incidental to the precedent the court thus sets.

Id. at 322 (Robinson, J., dissenting).

68 551 S.W.2d 621 (Mo. 1977).

in *Schmerber* and *Crowder*.[69] Specifically, the Missouri court held that a suspect must be provided an adversary hearing and an opportunity for appellate review before a court order compelling surgery can issue.[70] The Missouri Supreme Court held that nonconsensual surgery complies with the fourth amendment only when the procedures enunciated in *Crowder* and *Schmerber* are followed.[71]

The Indiana Supreme Court reached a contrary result in *Adams v. State*,[72] in which nonconsensual surgery was held to be a *per se* violation of the fourth amendment. In *Adams*, the defendant was charged with killing a police officer during the course of a supermarket robbery. After bullet fragments were surgically removed from his hips and buttocks and introduced in evidence against him, Adams was convicted of premeditated murder and felony murder.[73]

On appeal, the Indiana Supreme Court reversed Adams' conviction, stating:

> We are confronted with an intrusion of the most serious magnitude. Here an actual surgical operation was performed on the Appellant to remove a bullet from inside his body. We do not sanction a surgical operation forced on a defendant for this purpose. We therefore hold that the Fourth Amendment prohibits the type of intrusion into the body of the suspect as occurred in this case.[74]

In the future, courts or legislatures may follow *Adams* and decide that nonconsensual minor surgery is a *per se* constitutional violation. This is entirely proper since the Supreme Court has not indicated a position on this issue. Even if it is finally determined that such surgery is not a *per se* constitutional violation, a state under its own constitution may grant its citizens greater protection than that required by the Federal Constitution. Nevertheless, the weight of present authority is that minor nonconsensual surgery, under carefully controlled procedures, does not inevitably violate the fourth amendment or the requirement of due process.[75]

B. *Major Surgery*

The nonconsensual cases examined thus far have concerned minor surgery, where the proposed operation posed little risk to the suspect's life. By contrast, major nonconsensual surgery, with its attendent trauma, pain, and greater threat to life, presents a more troubling constitutional question.

The first case in which the state requested an order authorizing major surgery was *Bowden v. State*.[76] In *Bowden*, a man fleeing from the scene of a

69 The Missouri Supreme Court asked, "Did what occurred in this case meet the requirements as laid down in *Schmerber* as amplified and applied in *Crowder?* We conclude not." *Id.* at 627.
70 *Id.* at 627-28.
71 *Id.*
72 260 Ind. 663, 299 N.E.2d 834 (1973), *cert. denied*, 415 U.S. 935 (1974).
73 *Id.* at 664, 299 N.E.2d at 835.
74 *Id.* at 668, 299 N.E.2d at 838.
75 *But see* Note, *Surgery and the Search for Evidence: United States v. Crowder*, U. PITT. L. REV. which argues that nonconsensual surgery is a fitting area for the adoption of a *per se* rule.
76 256 Ark. 820, 510 S.W.2d 879 (1974).

robbery-murder was shot with a .38 caliber gun. A few minutes later, Bowden appeared at a local hospital suffering from a bullet wound. X-rays revealed that a bullet, similar to a .38 caliber slug, was lodged in his spinal cord.

The Arkansas court approved a search warrant application authorizing removal of the bullet. Pending the operation, however, the court permitted Bowden to apply to the Supreme Court of Arkansas for a temporary stay of this warrant.[77] At this hearing, physicians testified that the removal of the bullet would require a general anesthetic and would constitute major surgery. The physicians also said that removal of the bullet would cause a worsening of Bowden's condition due to the involvement of the spinal nerves. On the basis of this testimony, the Arkansas Supreme Court held that the operation was a major intrusion involving pain, trauma, and possible loss of life.[78] Since this operation went beyond the permissible boundaries set out in *Schmerber* and *Rochin,* the court quashed the search warrant.[79]

The only other nonconsensual surgery case involving a major operation is *People v. Smith.*[80] In this case, a New York district attorney suspected Smith of murdering a New York City policeman. Police-ordered x-rays showed a metallic foreign body lodged beneath Smith's posterior chest wall but outside the actual breast cavity.[81]

A physician examined Smith and submitted a report to the court. The doctor reported that removal of the bullet would take one hour. The doctor added that a general anesthetic would be needed and that he considered this operation major surgery.[82] The physician reported that the surgery would require an incision six inches long. The incision would be deepened through the tissue under the skin and then through the large muscles in the back of the neck. The next layer of muscles would then be split and pushed aside. After the bullet was retrieved, the incision would have to be closed in layers. A rubber drain would then be placed in the incision for twenty-four to forty-eight hours. The physician said that the general anesthetic used in the surgery could cause cardiac arrest and certain respiratory problems. Moreover, medical tests indicated that the bullet was not harmful and could stay imbedded in Smith for the rest of his life.[83]

The New York Supreme Court held that the contemplated operation constituted a major intrusion into Smith's body.[84] The trauma, pain, and possible loss of life which this operation entailed clearly went beyond the criteria set out

77 *Id.* at 821, 510 S.W.2d at 879.

78 The two doctors who examined Bowden testified that in their medical opinion, the proposed operation constituted a "major intrusion" into the suspect's body. *Id.* at 824, 510 S.W.2d at 881.

79 The Arkansas Supreme Court said that "in applying the requirements of *Schmerber,* in the case at bar, we hold that the issuance of the search warrant does not meet the stringent standard of reasonableness there enunciated." *Id.*

80 80 Misc.2d 210, 362 N.Y.S.2d 909 (1974).

81 *Id.* at 211, 362 N.Y.S.2d at 910.

82 *Id.* at 212, 362 N.Y.S.2d at 911.

83 *Id.* at 214, 362 N.Y.S.2d at 912.

84 The court held that:

> the proposed operation would constitute a major intrusion into the body of the respondent that would involve trauma and pain and possible risk of life and is over and beyond the major intrusion set down in Schmerber v. California, *supra.*

Id. at 216, 362 N.Y.S.2d at 914.

in *Schmerber* and *Rochin*. Accordingly, the court refused to allow the operation because it would violate Smith's fourteenth amendment right of due process and freedom from unreasonable searches.

Smith and *Bowden* are the first nonconsensual surgery cases involving an operation which constituted a substantial threat to the suspects' lives. Both courts correctly decided that the fourth and fourteenth amendments forbid such major intrusions no matter how compelling the state's need for the evidence.

The minor surgery in *Creamer, Crowder* and *Overstreet* is fundamentally different from the major surgery involved in *Smith* and *Bowden*. *Crowder* shows that it is possible for the state to prove a compelling need for evidence superficially imbedded in a suspect's body. The carefully drawn surgical order and meticulous medical precautions in *Crowder* insured that the demands of due process and the fourth amendment were met. *Crowder* is an example of a nonconsensual operation which is not "brutal" or shocking to the conscience.

On the other hand, *Bowden* and *Smith* provide examples of major nonconsensual surgery inherently violative of both due process and the fourth amendment. The operations in both *Bowden* and *Smith* posed a clear risk to the life of the suspect. Permitting such a major operation would not only constitute an unreasonable search but it would also offend a "sense of justice" and "shock the conscience."[85]

IV. A Uniform Standard

The cases have shown that the basic problem in the nonconsensual surgery area is in determining when the proposed surgery meets the demands of due process and the fourth amendment. Despite the various factual situations in which the question of nonconsensual surgery may arise, the competing values would be the same from case to case. The state's interest in convicting criminals and in protecting its citizens must be balanced against an individual's interest in avoiding bodily intrusions. Therefore, a uniform standard should be utilized whenever a state seeks to compel a person to undergo surgery.

The following suggested standard establishes a rigid set of criteria which should be followed before a court order compelling surgery can issue. If this standard is followed, nonconsensual surgery can be performed without violating a suspect's constitutional rights. Adherence to this standard would eliminate the inconsistency and confusion that have marked the cases in the nonconsensual surgery area.

A. *A Major Surgery/Minor Surgery Dichotomy*

A prosecutor who has reason to believe that a suspect has evidence of a crime within his body should first apply for a search warrant to surgically retrieve this evidence. The court considering the application should then require medical examination of the suspect. The suspect should be examined by his own doctor and by the prosecutor's doctor to determine the safety, necessity, and possible effects of the proposed operation.

85 *See* note 35 *supra.*

The doctors' first decision should be whether the proposed operation would be major or minor surgery. It must be stressed that this would be a medical determination. Such medical factors as the type of anesthetic to be used, the risk to the suspect, the possibility of infection, and the medical necessity for the operation would play a part in this decision.

If the suspect's doctor and the prosecutor's doctor disagree, the judge would appoint his own medical expert. This expert would study both doctors' reports, examine the suspect, and present a final opinion as to whether the contemplated surgery was major or minor. Since this initial decision would be medically determined, the judge is not forced to make a decision outside his expertise.

This minor surgery/major surgery dichotomy is implicit in some of the nonconsensual surgery cases. In order to have a uniform, consistent method of examining requests for orders compelling surgery, however, doctors who examine the suspect should make a specific medical determination as to whether the proposed operation is major or minor. Only in *Crowder, Bowden, Overstreet,* and *Smith,* did the physician specifically decide whether the contemplated operation was major or minor. In *Creamer,* the medical evidence went to show that the operation could be performed safely. In *Adams,* the medical testimony showed that the operation could be performed with a local anesthetic. As discussed earlier, these are only two of the factors involved in a minor operation.

1. Major Surgery: *Per Se* Constitutional Violation

If it is medically determined that the suspect's operation would be major surgery, the search warrant should not issue. Nonconsensual major surgery should be a *per se* violation of both the fourth and fourteenth amendments. The court in *Rochin* said that an act violated due process when it "shocked the conscience"[86] and "offended the canons of decency and fairness which express the notions of justice of English-speaking people."[87] Surely a major operation, in which the life of a suspect may be endangered, is more repugnant to the court than the forced stomach pumping in *Rochin.* Major surgery, with its attendant risk, trauma, pain, and affront to dignity, should accordingly be considered a *per se* violation of the fourth amendment. Major surgery is clearly a major intrusion which is forbidden by *Schmerber.*[88]

2. Minor Surgery: Constitutional Criteria

a. *Prosecutorial Burden*

If the proposed operation was medically determined to be minor, the prosecutor would then have the burden of satisfying a number of different criteria. The prosecutor should be required to demonstrate at a judicial adversary hearing that he has probable cause to believe that the suspect committed the crime and that evidence of that crime is within the suspect's body. Furthermore,

86 342 U.S. at 172.
87 *Id.* at 169.
88 384 U.S. at 772.

the prosecutor should have to show that this evidence is vital to his investigation, and could not be obtained in any other way. The suspect should also be able to cross-examine the prosecution's witnesses and present his own witnesses.[89]

In all of the minor surgery cases there was probable cause that the suspect committed the crime and that evidence of that crime was in his body. In *Creamer,* however, there was no proof that the evidence was vital or otherwise available. Only in *Crowder* did the court establish that these criteria had been met.

In order to justify this surgery, the crime with which the suspect is charged must be a serious felony, such as murder or kidnapping. As discussed earlier, the state must show a compelling interest in this evidence in order to outweigh an individual's immunity from bodily intrusions. The state's need to protect its citizens from violent crimes is one factor which establishes this compelling interest. The murders in *Creamer, Crowder, Overstreet,* and *Adams* would qualify as such a felony, but such lesser crimes as robbery or burglary would not.[90]

b. *Appellate Review*

If the prosecutor satisfies all these criteria, the court should issue a search warrant authorizing this minor operation. As in *Bowden, Crowder,* and *Creamer,* however, the suspect must be given a temporary stay of this order so he can apply for appellate review of this search warrant.

It is crucial that the suspect be afforded the chance for appellate review *before* the operation is performed. *Adams* and *Overstreet* failed in this respect, because appellate review was given to the suspect only after the operation had taken place.

If the higher court reviews this surgical order, and decides that the criteria have been satisfied, the operation should take place. As in *Crowder,* however, this surgery must take place in a hospital under the strictest medical safeguards.

This proffered uniform standard should produce consistent results in this area. It is true that this standard is so rigorous, that it will be the rare case in which the prosecutor will be able to obtain the order authorizing surgery. Of the cases examined, perhaps only *Crowder* was able to fulfill the criteria. Nevertheless, it is appropriate to place this burden on the prosecutor because of the considerations involved. Even a minor operation involves considerable affront to a person's dignity. As the court said in *Schmerber,* "The integrity of an individual's person is a cherished value in our society."[91] It is fitting that the state be required to show a compelling need for this surgery before a person's usual immunity from bodily intrusions is overcome.

V. Conclusion

Nonconsensual surgery presents the basic question of whether the state may

89 *See, e.g.,* State v. Overstreet, 552 S.W.2d 621 (Mo. 1977).

90 It is also doubtful if the attempted robbery in *Allison* would qualify as such a serious felony. *See* note 52 *supra.*

91 384 U.S. at 772.

reach inside the human body to extract evidence surgically. A compulsory operation raises obvious constitutional issues. It is the focus of the note, however, that nonconsensual surgery is not necessarily a violation of the fourth amendment's proscription of unreasonable searches or of the fourteenth amendment's guarantee of due process. The difficult problem lies in ascertaining what criteria should be used in measuring the state's interest in convicting criminals against the suspect's interest in keeping his body free from intrusions.

Although the Supreme Court has never ruled on nonconsensual surgery, the *Rochin, Breithaupt* and *Schmerber* cases are helpful by way of analogy. In these cases the Supreme Court defined permissible bodily intrusions. In *Rochin* and *Breithaupt,* the Court indicated that an intrusion violated the due process clause of the fourteenth amendment when it "shocks the conscience" or offends a sense of fairness. The blood test in *Schmerber* was held to be a permissible minor intrusion under the fourth amendment because it provided a deterrent against drunk drivers, involved no risk or trauma, and was given in a hospital environment.

The nonconsensual surgery cases have attempted, with varying degrees of success, to come to grips with this difficult problem. *Smith* and *Bowden* correctly decided that nonconsensual major surgery was not permissible. *Creamer* authorized minor surgery after mistakenly interpreting *Schmerber* as authorizing all minor intrusions. The *Overstreet* court followed *Crowder* and held that a suspect must be afforded a judicial adversary hearing and an opportunity for appellate review *before* a surgical order could issue. The *Adams* court opted for the highest degree of protection for its citizens by banning all nonconsensual surgery. Only the *Crowder* case provided a thoughtful analysis of the constitutional problems that a state-ordered operation presents. The *Crowder* court concluded that under certain circumstances, minor nonconsensual surgery does not violate the fourth or fourteenth amendments.

Past nonconsensual surgery cases have thus demonstrated that the real problem lies in determining what standard should be used to evaluate when an individual's usual immunity from bodily intrusions is outweighed by compelling interests of the state. It is for this reason that this note advances a uniform standard which a state may use when presented with the problem of nonconsensual surgery.

It is submitted that this proposed uniform standard will withstand constitutional challenge. Major nonconsensual surgery should be prohibited as a *per se* violation of the fourth and fourteenth amendments. If the proposed operation is medically determined to be minor, then the prosecutor has the burden of establishing certain specific criteria. If this burden is met, then the state has shown a compelling need for the evidence, greater than the suspect's need to preserve his bodily integrity. Under these circumstances, a minor nonconsensual operation would be constitutionally permissible if it were carried out with the procedural and medical safeguards embodied in the standard. It is only under these carefully controlled and limited circumstances that the state may order an individual to submit to nonconsensual surgery.

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